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THE MADRAS IRRIGATION BILL.

The key to the whole bill is to be found in the declaration contained in the statement of objects and reasons that all rivers, natural streams and springs in unoccupied or Government land (including apparently all ryotwari land within that term) belong to the Government. There is little evidence in support of this extravagant claim. The interested declarations of Revenue officers are not by themselves evidence of immemorial usage. The terms of old sale-deeds and gift-deeds conveying ashtabhogams (Jala, Taru Pashana, etc., are, we should think proof conclusive to the contrary. Of course, a vague right of the Government to regulate waters of rivers, and natural streams seems to have been recognised, rather allowed to pass unobjected to but this is only the result of the theory that public good should be placed before private rights. For instance, it is said by Yagnawalkya.

"*Na Nishedhyolpa badhastu setuh Kalayana Karakah Parabhumim haran Kupah swalpakshetro bahudakah*"

"The construction of dams and wells is of such great public use that a little damage to individual proprietary interest may be disregarded." The man that built the dam was recognised to have all rights in respect thereof—and note what Vignaneswara says in that connection.

"*Yada thwanyanirmitamsetum bhedanadina nashtam swayam samskaroti tada purvaswaminam tadwamsyam nripamva prshtyeva samskuryat*"—"*Mritetu swamini punah tadwamshye vapi manave rajanamamantrya tatah Kuryat setu pravartanam*"

"If one has built a dam which goes out of repair, another can improve and use it only with the permission of the builder, in default, of his heirs, in default, of the king."—The king is not believed to have any voice in the matter except as *ultima heres.*

Fischer v. *The Secretary of State for India.*[1] which goes farthest in the matter of the enunciation of state rights, only

1. (1908) I. L R 32 M. 171.

declares the right of the state to regulate natural streams and rivers without injury to the accustomed user of riparian proprietors. Even as regards ryotwari proprietors the right of the Government is subject to the rights of the former to receive their accustomed supply. *Sankaravadivelu Pillai* v. *The Secretary of State for India* [1], *Ramachandra* v. *Narayanasami.* [2] The right of the Government to control the waters of streams is in virtue of its sovereign right and not by virtue of its ownership of the streams *Fischer* v. *The Secretary of state for India* [3] The beds of natural non-navigable and non-tidal streams have been held to belong to the adjoining proprietors being Zamindars or whole village Inamdars, *Raja Venkatalakshmi* v. *Secretary of state*[4] , and the streams in so far as they flow on such beds have also been held not to belong to the Government. *Secretary of State for India* v. *Maharajah of Bobbili*[5] *Chinnappa Chetty* v. *Secretary of State for India* [6]. Even in the case of ryotwari holdings if the pattadar pays revenue for the bed of the stream, the stream would belong to him. *Kaliana Mudali* v. *Secretary of State* [7]. Private ownership of streams is the normal feature in Malabar. *Neelakhandan Nambudripad* v. *The Secretary of State for India* [8]. It is also not an unusual feature in Canara with respect to small streams. Preferential rights of Mirasidars to water from tanks over new grantees of waste land have been recognised [9]. In the case of supply of water from tanks, streams or canals under Government supervision, the right of the ryotwari proprietor is of course to the necessary quantity of water and may not extend to having the same *source* of water supply maintained for all time. There is no justification for predicating the same as regards the rights of ryotwari proprietors in general even when they claim the right by reason of the ownership of the stream or by reason of an easement as against the Government or as against another owner.

Having regard to the foregoing it seems to us that the declaration of Government right in S. 6 of the Bill is couched in far too general terms and without the necessary qualifications. S. 6 is in these terms : "Subject to the provisions of this Act, the Government have and are hereby declared to

1. (1904) I. L. R. 28 M. 72, 2. (1892) 16 M. 333 ; 2 M. L. J. 279.
3. (1908) I L. R. 32 M. 141. 4. (1918) 41 M. 841.
5. (1919) I L R 43 M. 529 ; 30 M. L. J. 163. 6. (1917) I. L. R. Mad. 239.
7. (1915) 31 I. C. 982. 8. (1919) 12 L. W. 371. 9. (1919) 51 I. C. 734.

have the right to regulate at their discretion for purposes of irrigation or drainage, the collection, retention etc.; of the waters of natural streams, channel, lake or other natural collections of water". We do not see any necessity for a declaration in these wide terms. If the object of the framers of the Bill was to afford facilities for the construction of irrigation works and distribution of the water, it should have been sufficient to make provision in that behalf or at any rate to declare the right to the extent necessary for that purpose. It is no doubt intended by the framers of the Bill that anybody injured by the exercise of any powers by the Governmet under the Act should receive compensation, but it is difficult to understand how such a position is logically consistent with the declaration that the Government *has* the power to regulate the distribution and supply of water at its discretion. The object of the Act is not really or at least in the main that but that of taking away first all *rights* apparently to irrigation and introducing in its stead State distribution of water at discretion. The Zemindars being powerful, their rights could not be easily ignored and they have been substantially preserved (see S. 11) but the ryotwari proprietors' rights are not similarly preserved. Another object of the Act apparently is to declare the right of the Government to levy cess in respect of all natural streams, etc. Here again, the right of the Zemindars when the stream is wholly within the limits of the Zamindari is preserved. The rights of the ryotwari proprietor in this matter have been wholly ignored. Except to the extent that their right to take water of the river in the exercise of their riparian rights when both the banks and the bed of the stream belong to them at any particular point where the water is sought to be taken as declared in *Chinnappan* v. *Secretary of State* [1] has not been recognised, the Zamindars have no complaint. In Malabar and Kanara the state has been maintaining no work of irrigation, the whole irrigation being carried on at the cost of individual proprietors bunding up natural streams. No Government British or Indian has levied any cess from them for any crop raised by them. Under the present Bill, no reservation has been made in favour of those tracts though these special features call for favourable treatment. In making rules for the award of compensation, the Government have pressed into service *Secretary of State* v. *Muthu Veerama Reddi* [2],

1. (1917) 42 M. 239. 2 (1910) 20 M.L.J. 869 ; 34 M. 82.

to an extent, we venture to think, not contemplated by the Judges who decided that case. That case lays down that the Government is not liable for damages for non-supply of water when it is due to non-repair of the water source. The view taken was that the right to water was a real right in the nature of an easement and not a contractual one against the Government and the Government's position in respect of the maintenance of tanks, etc., being analogous to that of a statutory body charged with public duty, it was not liable for non-feasance. That case can in no sense be regarded as an authority for non-liability for flooding by non-repair which is euphemistically called increase of water. The Government, we venture to think, cannot take cover under that decision and plead exemption from liability for flooding the land when the flooding is due for instance, to a breach of an embankment which is left un-repaired. That is not a case of non-repair but a case of malfeasance or negligence for which a statutory body is always liable. Nor is there any justification for the Government levying a cess for repair of irrigation sources or refusing compensation for stoppage of water during the time repair works are going on. Even the right of remission in respect of the assessment during that period is not recognised. *Secretary of State* v. *Muthu Veerama Reddi* [2] did not and could not deal with the right of remission as the question of the amount of assessment is taken away from the cognisance of the Courts by the Revenue Recovery Act. When a comprehensive measure as to irrigation is intended to be enacted all such rights should be expressly declared. The act should also reserve all rights of priority as between pattadars recognised by custom or by reason of prescription.

The standardising of rights of ryotwari proprietors sought to be effected by the Act has resulted in a general lowering of their rights. The Bill, it may be noticed, fights shy of calling the ryotwari holder a proprietor, though as early as 1802 his proprietorship was recognised in Reg. 26 of 1802. All ryotwari land is called Government land—it would not have mattered much by itself but for the fact that the nomenclature adopted in the Act is coupled with the assertion of very wide rights in the Statement of objects and reasons. The ryotwari proprietor is becoming a victim of Revenue Shibboleths which will deprive him of his substantial rights if

2. (1910) 20 M.L.J. 869=34 Mad 82.

protest is not made betimes against the tendency. No compensation is given for stoppage of water if for 5 years, the land was not irrigated. Why it should be so, it is difficult to understand. The compensation will necessarily vary according to the water facilities and the fact of non-supply must only be a factor in determining the amount of compensation. The Government may altogether stop the water supply and pay compensation of 15 times the dimunition in annual net profits in the absence of satisfactory means of arriving at the loss in market value which mode of determination, we are afraid, may become the normal feature having regard to the uncertainty in which the whole subject of the rights of the ryotwari proprietor is enveloped. From the comprehensive nature of the legislation one should have expected that the Government would have made an attempt to declare the conditions under which and the principles on which water cess should be levied. The standing orders of the Board of Revenue contain certain restrictions on the levy. Whether those conditions are sufficient and what relation the cess should bear to the cost of the irrigation work should be considered and form the subject of legislation. As it is, we must confess to an utter feeling of disappointment at the way in which legislation is undertaken—fixing the rights of the Government at the highest, removing all customary and recognised restrictions thereon and leaving the rights of the subject to be determined by executive rules and orders. The provisions as to the construction of water courses are so elaborate and involve so many restrictions that resort to them by private individuals will be as rare as resort to Government loans, if not rarer. Construction of works through public departments is sure to be too costly to be remunerative for any private individuals to undertake and the only effect of the Statute, so far as we can see, would be the improvement of the taxing resources of the Government.

The Act invests the irrigation officer with such multifarious duties and powers that unless the officer is one of high status, the scheme is likely to lead to great oppression in practice.

The chapter as regards compulsory labour seems to go further than the Act of 1858. The latter Act provided only for commandeering the services of labouring classes. We quite realise that these are democratic days but in removing that limitation, the Act may place a powerful engine of oppression in the hands of petty officials.

The chapter on customary labour seems to carry the liability of the ryot much further than hitherto recognised (compare the Board's Standing Order, No. 16) and there is no justification for making the Local Government a final Judge on questions of custom and excluding the jurisdiction of Courts in that matter. The Government has had no such power hitherto and yet things have gone on for years without trouble and we do not see any special reason for the enacting of these laws. All these provisions for labour afford opportunities for vexatious pin pricks.

Organisation of irrigation punchayats is an interesting feature of the Act but their success would largely depend on the absence of factions in the villages concerned and on the care taken in drawing up rules so as to neutralise the possible effect of the existence of such factions.

We think in Ss. 11 and 12, provision should be made for the preservation of rights and priorities of ryotwari proprietors as well. In S. 15 (2), it must be made clear that appeals lie from the decision of the Principal Court of Civil jurisdiction. We also think that resort to Civil Courts should be permitted when departure from existing mamool is sanctioned by the Revenue Officers. S. 55 involves a serious encroachment on the rights of ryots in Zamindari land. There is no reason why resort to Courts should not be permitted in such cases.

B. SITARAMA RAO.

SUMMARY OF ENGLISH CASES.

ANDERSON, LTD. *v.* DANIEL, (1921) 1 K. B. 138.

Contract—Illegality—Statutory provisions—Failure to comply with—Policy of Statute—Fertilisers and Feeding Stuffs Act, 1906*—Contravention of.*

Under the Fertilisers and Feeding Stuffs Act, 1906, a person who sells for use certain fertilisers has to give the purchaser an invoice stating the percentage of certain chemicals contained therein and the Act provides that on failure to do so, the vendor is without prejudice to any civil liability, liable to a penalty on conviction. In a suit by the vendor of such a fertiliser to recover the sale price, the vendee pleaded non-liability as the statutory invoice had not been given to him. *Held*, the action was not maintainable, the sale being illegal.

Per Bankes L. J. :—It is not necessary to show a contract is illegal *ab initio* in order to avoid it ; it is enough to show the vendors failed to perform the contract in the only way in which the statute allows it to be performed, and the vendor in such a case is exactly in the same position as if the contract had been illegal and void *ab initio.* Nor is the prohibitive expense or physical impossibility of analysis of the substance sold an excuse for the absence of an invoice.

Per Scrutton, L. J. :—When the policy of an Act is to protect the general public or a class of persons by requiring that a contract shall be accompanied by certain formalities or conditions and a penalty is imposed on the person omitting the same, the contract and its performance without those formalities or conditions is illegal and cannot be sued upon by the person liable to the penalties.

Per Atkin, L. J. :—The question of illegality in a contract may arise in connection with its formation or its performance. In either case, the contract is unenforceable by either party.

HARPER *v.* HEDGES, (1924) 1 K. B. 151.

Statute—Presumption of—If can be drawn—Illegal acts —Validity.

The Court of Appeal doubted if an Act of Parliament could be presumed to have been made and lost within the last hundred and fifty years in order to give validity to an act otherwise illegal.

HARNETT *v.* HARNETT, (1924) P. 41.

Restitution of conjugal rights—Suit for—Absence of sincerity on the part of applicant—Effect.

The petitioner for restitution of conjugal rights should satisfy the Court that he or she sincerely desires the relief asked for. Before the Matrimonial Causes Act, 1857, the only defence to such petitions was that the petitioner had committed a matrimonial offence. The sincerity which is required

to be proved is not inconsistent with an intention to take further proceedings in the Divorce Court if the course of refusal is persisted in.

EUSTACE *v.* EUSTACE, (1924) P. 45.

Judicial separation—Jurisdiction—Test of—Domicile or residence.

In proceedings for judicial separation domicile gives jurisdiction to the Court ; so also where the respondent resides within the jurisdiction of the Court. Case-law and the history of legislation dealt with.

In re BEST : PARKER *v.* BEST, (1924) 1 Ch. 42.

Insurance policy—Mortgage to company—Subsequent assignment to wife—Assignor's estate—Liability to redeem.

An insurance policy holder borrowed some money from the Insurance Company on a mortgage of the policy and entered into a convenant with them to pay the same himself. He then assigned the policy to his wife without disclosing the existence of the mortgage. On his death the Company gave the insurance amount to the widow deducting the amount due under the mortgage. *Held,* the deceased being also under a personal liability to pay the amount due, the estate of the deceased was bound to pay the widow the amount deducted by the Insurance Company. (1907) 2 Ch. 465 followed.

In re MERRALL GREENER *v.* MERRALL, (1924) 1 Ch. 45.

Administration—Lunacy—Advances to relations out of income—Directions to deduct at the end—Discretion of Court to enforce.

A Receiver was appointed to the property of a lunatic and under the orders of the Master in Lunacy a portion of the income was spent every year as allowances to various relations of the lunatic, the same being considered as advancements and to be finally taken into account if under the will of the lunatic they happened to get any share of the estate. By the time of the death of the lunatic some of the relations who drew allowances were dead, some were given under the will only

life interests and still others were not entitled to anything at all. *Held,* the Court in administering the estate of the deceased had a discretion not to enforce the stipulations as regards treating the allowances as advancements and as such the whole of the Master's directions could be ignored *in toto,* if that would be the most equitable thing under the circumstances.

In re CUNNINGTON HEALING *v.* WEBB, (1924) 1 Ch. 68.

Conflict of Laws—English will—French domicile—Law applicable—Personalty.

An Englishman who was long resident in France and whose domicile was decided to be French left a will in the English form, appointing an English executor and the legatees to his estate which consisted only of personalty were all Englishmen. The will was proved in England. On the question arising about the construction of the will, *held,* the domicile of the testator being French, in the case of moveables the will must be construed according to the law of the domicile unless the will contains expressions showing an indication that it should be construed according to English Law.

In re STANFORD UNIVERSITY OF CAMBRIDGE *v.* ATTORNEY GENERAL, (1924) 1 Ch. 73.

Charity—Gift for express purpose—Surplus—How to be disposed—Absence of general charitable intention.

A testator gave a certain sum of money to the Cambridge University on trust for publishing a compilation of the testator and one of the executors was the residuary legatee. Out of the amount given a portion remained after the work was published and the University claimed it was beneficially entitled to the surplus or in the alternative the *cypres* doctrine would apply. *Held,* (1) the University was only a trustee for an express purpose and that being over, the surplus did not belong to them ; and (2) there being no general charitable intention to except as regards the particular publication there was no scope for the *cypres* doctrine apply and (3) that therefore there was a resulting trust to the testator and those claiming under him of the surplus.

In re MORANT : EX PARTE THE TRUSTEES (1924) 1 Ch. 79.

Bankruptcy—Money paid to agent on behalf of creditor—Fraudulent preference—If can be recovered from agent—Agent if trustee—English Bankruptcy Act (1914), S. 44.

Where an agent in the ordinary course of his employment receives payment of a debt for the use of his principal and in good faith pays the money over to, or otherwise deals to his detriment with, his principal in the belief that the payment is a good and valid payment, then the money cannot be recovered from the agent although it turns out that, in fact the payment was a fraudulent preference. In such a case the money must be recovered from the Principal. If the agent knows the debtor is insolvent and is making the payment with a view to prefer the creditor, the trustee, in bankruptcy can recover it from the agent on the ground he was party or privy to the fraudulent preference.

In the ordinary case of payment to an agent for the use of his principal, the agent is not a person in trust for the creditor within the meaning of S. 44 of the Bankruptcy Act.

In re FALKENER MEAD *v.* SMITH, (1924) 1 Ch. 88.

Will—Bequest—Legatees to apply property in accordance with memorandum—Express direction that memorandum not to create trust—Agreement by legatee to carry out wishes—Effect.

Under a will the property was given to two legatees absolutely as joint tenants with the request that they would dispose it of in terms of her memorandum. It further provided that the memorandum was not of a testamentary character, nor was it to create any trust. It was in evidence that the legatees who were the solicitors who prepared the will actually advised the testator to include in the will itself the beneficiaries mentioned in the memorandum, but that the advice was rejected. *Held* the legatees took their interests absolutely for their own benefit. *Held* the legatees took their interests absolutely for their own benefit.

If a gift made absolutely by will is induced by a representation that the donee will apply the same in some special manner indicated by the testator, Courts will impose a trust on the

donee binding on his conscience and will give effect to it. *Held* on the facts of the case, there was no such agreement creating a trust. 57 L. T. 519 referred to.

PERFORMING RIGHT SOCIETY, LTD. *v.* LONDON THEATRE OF VARIETIES, LTD., (1924) A. C. 1.

Copyright—Future works—Assignment of rights—Infringement—Assignee if can sue for injunction—Assignor necessary party.

A person to whom the performing rights in certain musical works to be composed in future are assigned and becomes by the completion of such works merely the equitable owner of the same, he cannot therefore obtain a perpetual injunction against persons who infringe the copyright in such work without joining the legal owner as party to the action.

EARNEST BECK & CO. *v.* SZYMANOWSKI & CO., (1924) A. C. 43.

Contract—Sale of goods—Reels of cotton—Condition as to objection regarding goods—Construction—Damages.

In a contract of sale of 200 yds.' reels of sewing cotton there was a condition that unless the buyer within fourteen days after the arrival of the goods notifies that they are not in accordance with the goods, he would have to pay for the same at the rate fixed. More than a year after delivery it was discovered that the reels were much less than 200 yds. in length and an action for damages for breach of contract was filed. *Held*, by the majority of the House of Lords (Lord Buckmaster dissenting), the condition fixing fourteen days for objections related only to the quality of the goods and not the length of cotton in each reel and the failure to object within such time was not a valid defence to the action.

DRUGHORN *v.* MOORE, (1924) A. C. 53.

Property tax—Landlord and tenant—Repairs executed by tenant in lieu of first year's rent—Tax paid by tenant—If can be deducted from next year's rent—Income Tax Act, 1918, *Sch. A, No. VIII, R.* 1*—If recoverable from landlord.*

A tenant who under an agreement with his landlord puts the demised premises in repair at his own expense, the agreement with the Landlord being that no rent should be payable for the first year cannot deduct from the rent for the second year the property tax levied from him under Sch. A, No VIII, R. 1 of the Income Tax Act, 1918. That rule applies only to cases where rent is payable for the year in which the tax was paid.

Nor could the amount paid as tax be recovered as money paid for the use of the landlord, since the liability to pay the tax is on the tenant and he is statutorily entitled only to deduct it from the rent.

ST. HELENS COLLIERY CO., LTD. *v.* HEWITSON, (1924) A. C. 59.

Workmen's Compensation Act—" Out of and in the course of employment "—Meaning of—Accident while returning by specially provided train—If amounts to.

The managers of a colliery for the convenience of their workmen had arranged with a Railway Company to run a number of special trains daily to bring their workmen to the colliery and to take them home. The workmen were not under any obligation to use the trains, but such of them as wanted it were given a concession rate while the colliery paid to the Railway Company out of the wages due while they on their part agreed to hold the Company free from liability in case of accidents, etc. A workman was injured as the result of an accident while returning home and he sued the Colliery Company for compensation. *Held,* by the majority of the House of Lords (Lord Shaw dissenting), the workman could not be said to have been injured while he was in the course of employment and as such no action lay.

Per Lord Atkinson :—The decision must turn on whether the workman was, when the accident which injured him occurred in the course of performing some duty arising out of his contract of service which he owed to his employer.

Per Lord Wrenbury :—A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order and the man would have owed a duty to obey it.

EASTERN SHIPPING CO., LTD. *v.* QUAH BENG KEE, (1924) A. C. 177.

Indemnity—Right to—When arises—Trustee and beneficiary—Breach of duty—Third party procedure.

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. The right exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. A trustee who acts in breach of trust may be liable to indemnify the *cestui que trust* if he commits a breach of trust.

A shipping company was allowed by the owners of a wharf permission to berth their ships on payment of the daily charges and they were also liable for damages caused. The managing director of the shipping company berthed a private ship of his without the company's authority and caused damage to the wharf. The owner of the wharf sued the company for damages, whereupon the latter served a third party notice on their manager and claimed indemnity. *Held* the managing director stood in a fiduciary position to the company and law implied a promise on his part to pay all damages caused by berthing a ship just in the same way as the company itself. The company was entitled to join him as a third party and claim indemnity from him.

UNITED STATES OF AMERICA *v.* MOTOR TRUCKS, LTD., (1924) A. C. 196.

Specific performance—Mistake—Rectification and specific performance if can be granted together—Effect of defeating Statute of Frauds.

Where a written contract entered into by the two parties does not express the true intention of the parties on account of a mutual mistake, it is open to a Court to rectify the mistake and direct specific performance of the rectified contract in one and the same action, although that would involve a parol variation contravening the Statute of Frauds.

ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* ATTORNEY-GENERAL OF CANADA, (1924) A. C. 203.

Provincial legislation—Conflict with Dominion Statute—Effect.

By a treaty between the King of England and the Emperor of Japan, the subjects of each were to have full liberty to reside in the territories of the other on the same basis as the citizens of the most favoured nation. This was declared to have the force of law throughout Canada by an Act of the Dominion Legislature. Subsequently the legislature of British Columbia passed an enactment under which no Japanese were to be employed in connection with certain leases and concessions granted by the Columbian Government. *Held,* the enactment was invalid as it violated the provisions of Dominion Legislation.

JOTTINGS AND CUTTINGS.

Legal Reconstruction in the Irish Free State.—Reconstruction is in the air, and legal systems and institutions are not likely to be exempt from the process. It is instructive to see what has happened already in what was till lately part of the United Kingdom, and is now the youngest of our self-governing States. We are privileged to present for the information of our readers a review of what has been done and what is planned in the way of 'Judicial Re-organisation in the Irish Free State,' by the Attorney-General, Mr. Hugh Kennedy, K. C., who is now on an official visit to this country. There is nothing apologetic in his utterance. He rather glories in the fact that, after so many centuries of submission to a system 'imposed from outside,' Southern Ireland should find 'among the very good things of liberty' the power to brush aside the English-made machinery, and to construct from the foundations a new judicial organisation. He claims, indeed, that the system which is being displaced was always regarded as an alien one, which 'neither took root among, nor derived anything of growth or sap from, the purely Irish population;' that in many respects it failed to provide for the needs of the community and, lastly, that the manner of its administration did not attract the confidence of the masses of the people. However that may be—and we have to remember, too, that, from purely historic reasons, our law and its methods have never been allowed to prevail on 'the other side of the border'—there is no doubt now that with the Irish opportunity has come the determination to make a clean sweep of the old tribunals and to establish in their place a new kind of judiciary,

'differing radically from that in existence under the British *regime*, but devised to meet the conditions of the Free State and its population.' The Courts will be popular, of course; and because they are home-made, and not 'imposed' from alien sources, the new machine may work more smoothly. It has to be remembered, too, that no attempt has been made, so far, to alter the system of law which the Courts have to administer, so that it may be hoped that fresh barriers of that kind will not be set up between the two peoples. Ireland has in the past produced many of our most notable lawyers—Cairns, Bowen, Russell, Palles, Fitzgibbon—and the Judgments of her superior Courts have also stood in high respect in ours. The jurisprudence which we have in common may well be allowed to stand and grow, unaffected by the special Irish customs and distinctive institutions which may receive a new development in the course of the work of national re-construction.

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The Death of President Wilson.—The death of President Wilson removes a great lawyers-statesman, whose work was of special importance and interest to the legal profession. This is not the place in which to estimate his political achievements, or the position which history will assign him in the development of his own country. Lawyers here will always remember him for the tenacity and faith which enabled him to incorporate into the Treaties of Peace made after the Great War the first main lines of an international juridical system which rested for its value and significance upon the principle that the disputes of nations were just as susceptible as those of individuals to settlement by the rational processes of the law, rather than by the more primitive and more drastic methods of war. The idea of the settlement of international quarrels by arbitration was familiar to lawyers and statesmen before Versailles, and had even been accorded a fitful, desultory and rather platonic approval. It was left to President Wilson to make this idea a reality, and transform it into a definite organ of international government. In many ways his cast of mind was essentially legal. He had the intellectual austerity, the clarity, and the accuracy of thought and expression of the highly-trained lawyer. It was not only in his establishment of the Covenant that he was enabled to give play to the juridical habit of his mind. It is now known that he played a great and personal part in the conduct of the American side

of the acute and sometimes dangerous controversy with this country in the earlier part of the war over blockade and contraband. He maintained triumphant the strictly legal view, and supported the attitude of his Government by copious references to the leading authorities in Prize Law as enunciated by the Courts on both sides of the Atlantic. This view he asserted with vigour and erudition against the more elastic theory of belligerent rights which was put forward by the British Foreign Office. By the passing of Mr. Wilson there goes a great force for law and order in the world, and it may well be that, when history records its final verdict, the inauguration of the arbitrament of law and reason in international affairs will be dated back to this great American President's ideas, for which he so strenuously fought while he lived, and which he continued to proclaim even after he had fallen from his high estate.

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Mr. Justice Swift on 'Fusion.'—Mr. Justice Swift, in delivering the prizes and scholarships won by students, at a largely attended meeting of the Liverpool Board of Legal Studies on Tuesday, expressed his pleasure at being once again present at the place where he commenced his studies for his career. He believed that the legal profession was the greatest of the professions. It brought a man into contact with every human interest, legitimate and illegitimate. The lawyers of a city like Liverpool were the business men of the community, because every business had from time to time to consult its legal adviser, and a great deal of business was done under the guidance of the legal profession. Whether the students went into the solicitors' branch of the profession, or to the Bar, they would require zeal, industry, and honesty to make them efficient and successful. He had never known a lawyer succeed either as a solicitor or as a barrister unless he was known as a thoroughly honest man. Speaking of the proposal for the fusion of the two branches of the profession, he confessed that when he had a moderate practice in Liverpool and an even more moderate practice in London, he was in favour of fusion, as he felt it would be a comfortable thing to have a dozen partners to do the work without his losing his proper share of the emoluments. He was quite sure that the ordinary conduct of litigation would be rendered neither easier nor cheaper by fusion. He thought, however, that it would be a proper and convenient thing if the door be-

tween the two branches should open very easily, so that a solicitor who found that he could talk coherently before a stipendiary magistrate should, if he desired, go to the Bar, and the barrister who could not string two words together in Court should become a solicitor.

Criminal Appeals from India.—Once more the Judicial Committee of the Privy Council have been obliged to protest against the persistent attempts that are made on behalf of Indian convicts to treat the Board as if it were a Court of Criminal Appeal. The general principle on which the Judicial Committee Act has been repeatedly stated, the last occasion being when the first batch of petitions for leave to appeal came from the Irish Free State. The doctrine that petitions to the Judicial Committee are not matters of right, but are an invocation of the King's grace to cure some defect of justice, is no mere historical relic, but a positive rule with practical consequences. Petitions for leave to appeal are closely scrutinised and not lightly granted. 'The responsibility for the administration of criminal justice in India,' said Lord Buckmaster last week, in intimating the rejection of the Indian petitions, ' is one that the Board will neither accept not share unless there has been some violation of the prineiples of justice or some disregard of legal principles.' One would suppose that that was plain enough for any one to understand, but words as plain have been used before, and still frivolous petitions continue to be presented. The blame, of course, rests with members of the legal profession in India, who would do well not to disregard the censure passed by Lord Buckmaster on their conduct. Very often petitioners are under sentence of death, and the only result of a frivolous petition is a hideous, long-drawn respite at the end of which the sentence must inevitably be carried out. In such a case nothing could be more abhorrent to common humanity—we say nothing of professional honour—than for a legal adviser to encourage an application to the Privy Council which he should well know must be refused under the established rule of the Court.

Perils of Publicity.—It is impossible not to sympathise with Mr. Justice Hill's observation in the remarkable divorce case of *Legge* v. *Legge and Landolf* last week about the publicity given to reckless statements made by litigants in person. There were some features of the case in question which

would lend support to the demand, which recently found expression in a Parliamentary Bill, for the statutory regulation of reports of matrimonial and other causes of the kind. Mr. Justice Hill's complaint, however, was of wider application. He very justly expressed regret that the newspapers should think it proper to report with some fullness cases of the kind known as 'sensational.' In such cases, especially when one of the parties insists on appearing in person, the privilege of the Court is taken advantage of in order to blazon forth all manner of accusations and suggestions that may have little or no support in evidence, and may even be irrelevant to the issue that is being tried. Grave annoyance, and even serious injury may thus be caused to innocent parties. But, however, much one may regret this, it is difficult to see how it can be avoided. Reports of cases that are offensive to public decency might be dealt with by legislation, but the mischief to which Mr. Justice Hill referred is by no means confined to cases that involved sexual matters. Indeed, nothing short of the prohibition of reports of proceedings in Court would remove it. The only remedy would seem to lie in the development of a strict sense of propriety and fair play on the part of the newspapers. Proprietors and editors might well reflect that if it is bad for a litigant in person to abuse his privilege by making reckless charges, it is even worse for newspapers to abuse their privilege by giving currency to them for purposes of gain.

Deportation and Departmental Orders.—Some very disturbing considerations are raised by the decision of the Divisional Court last week in the wife's deportation case, *Rex* v. *Superintendent of Leman Street Police Station ;* ex parte *Bressler.* The applicant's husband, an alien, having been convicted of the offence of failing to register, was deported, and an order for deportation was subsequently made against the applicant, though nothing was alleged against her, and she had other means of support. The action of the Home Office on the face of it seems harsh. Not only was the applicant guiltless of any offence, but she was anxious to remain in this country with relatives who are naturalised British subjects, and her deportation operates for practical purposes as a sentence of expulsion also against her infant child, who happens to be British born. The applicant accordingly asked the Court to say that the order against her was made on insufficient grounds, or in the alternative that it was *ultra vires,* in that the

Aliens Restriction Acts, 1914 and 1919, do not empower the Secretary of State to make such an order of his own motion and without the recommendation of a magistrate. The latter point is certainly a bad one. The Acts give the Secretary of State a general power to order deportation, and one may search them in vain for any qualification such as is suggested. One thing, however, the Act of 1919—which solemnly invested the Home Secretary in time of peace with far more drastic powers against aliens than he had enjoyed in time of war—did not do: it did not in terms oust the jurisdiction of the Court. It is one of the great traditions of the King's Bench that it is the guardian of the constitutional liberties of the subject, and therefore we regret that in *Bressler's Case* the Divisional Court (with the exception of Mr. Justice Shearman), seemed to accept without a qualm the position that the Acts render the Courts powerless before the Secretary of State's '*Hoc volo, sic Jubeo.*' Mr. Justice Avory went so far as to say that 'the Court had no power to inquire into, much less to criticise, the grounds on which the Home Secretary acted in any particular case.' With all respect to the learned Judge we must say that this is putting the case much too high. The point was considered by the Court of Appeal in *The King v. Superintendent of Chiswick Police Station* (1918) (1 K. B. 578), in which the late Lord Sterndale and Lord Justice Warrington expressly refused to commit themselves to the proposition that the Court could in no case go behind an order of the Home Secretary that was on the face of it regular. It cannot seriously be contended that the Court could not inquire into an order that had been made on no legal grounds at all ; and this present wife's appeal certainly seems such a case.

Privy Council and wasteful printing.—The conduct of Indian appeals has again been the subject of sharp comment by the Judicial Committee of the Privy Council—this time with reference to unnecessary expenses incurred. In intimating last week that an appeal from Lahore would be dismissed, Lord Shaw said that it was agreed that the entire points in the appeal were substantially covered by a reference to a few documents which could have been presented to the Court in a succinct and business like paper of a few pages. There had been printed in India, however, an elaborate book of 1,163 pages containing very many inaccuracies. When the Registrar looked at the

case before the hearing he was of opinion that a large part of put before their Lordships. He, therefore, communicated the record could not under any circumstances be necessary to with the appellants' solicitors, and the latter, after consultation with their counsel, eliminated more than 540 pages. These were actually taken out of the bound books and were never before the Board. Had the judgment been favourable to the appellants and entire costs of that printed matter would have been disallowed.

The Challenging of Women Jurors.—Mr. Justice Rowlatt, while presiding last week at a lecture by Sir Harry Stephen at the University of London, on the criminal law, disputed the lecturer's statement that the practice of challenging jurors was virtually obsolete. He declared that the practice of challenging women jurors in murder trials was common, if not universal, the reason being that women were regarded as hard-hearted and great believers in the rope for murderers. The learned Judge, of course, ought to know, but we are inclined to think that he exaggerates the extent to which women are objected to in murder trials. Since women became liable for jury service there have been few notable murder trials at the Central Criminal Court in which the jury has not included at least one woman. The remarks of the Judge, however, may serve to direct attention to a practice which can hardly be prevented so long as the right to peremptory challenge remains, *viz.*, the challenging of jurors for no other reason but their sex. It is, we believe, almost universal in the case of offences against children. It is a short-sighted as well as a wrong practice, for it does not necessarily operate in favour of an innocent defendant. The capacity of some children, particularly girls, for inventing stories that are as plausible as they are disgusting is notorious. Such a child in the witness box is more likely to be believed by a jury composed exclusively of men than by one that contains two or three shrewd married women.

An Australian Government Appeal.—When it is established that under the laws of a Colony an action can be brought against the Colonial Government in tort as well as in tort contract [as was conceded in the Privy Council, in *Welden* v. *Smith, representing the South Australian Government* (Janu-

ary 29) to be the case], the Government will be liable for loss caused by the negligence of its servants and agents in the execution of statutory duties undertaken by it for reward. This follows from the decision of the Judicial Committee in *Brabant* v. *King* (1895) 64 L. J., P. C. 161, where it was held that the Government, being bailees of goods for hire, were liable for negligence causing the loss of the goods. The rule that public bodies are not liable to individuals for non-feasance does not apply, it was laid down, where a public body is, under a contract with the individual, bound to exercise care. In the present case, the plaintiff's claim was for damages arising from the negligence of the servants of the South Australian Government in the performance of the duties of the Govermnent under the Wheat Harvest Acts, 1915—17, of South Australia. Under those Acts every owner of wheat might deliver it to the Government for sale on his behalf, and all the wheat so delivered might be pooled, and the net proceeds were to be divided proportionately among the owners. The Government were empowered to appoint either companies, firms, or individuals as their agents for receiving, storing, and delivering the wheat, and the complaint was that by the negligence of such agents large quantities of wheat were damaged or destroyed by mice, and by exposure to weather. The nominal defendant delivered a defence which contained, *inter alia*, the following plea

The nominal defendant will object in point of law that the petition of the palintiff is bad and insufficient on the grounds following, that is to say (2) That the petition discloses no cause of action nor any sufficient or lawful obligation nor any obligation on the part of the Crown towards the petitioner ; nor any legal or equitable right of the petitioner against the Crown cognizable by the Court or enforceable therein.

This objection was disallowed by the Full Court of the Supreme Court of South Australia, but on appeal to the High Court of Australia, that Court reversed the decision, holding that the claimant's petition disclosed no cause of acion. The Judicial Committee were of opinion, however, that in point of law the Government might be made liable for negligence and want of reasonable and proper care, if proved, and they accordingly advised that the order of the High Court of Australia be reversed. The Government were, in fact, engaged in commercial transactions on a large scale, as was often done

during the late war, and it is satisfactory that the Privy Council were able to hold that their responsibilities to parties dealing with them were as great as those of individual traders—as the full Court of South Australia itself had, in the first instance, decided.

CONTEMPORARY LEGAL LITERATURE.

Judicial Self-Limitation —Under this suggestive heading a writer in the Harvard Law Review for January, 1924 groups together cases in which Courts have declined jurisdiction on the ground that the controversy involved admitted of political rather than judicial solution.

The first English case he cites is the Duke of York's claim to the Crown in the middle of the 15th century. The Duke's suit was for a declaration that he was the rightful heir to the Throne. The Judges said that they " durst not enter into any communication thereof, for it perteyned to the Lordes of the Kyngs bloode. " A century later the King's Council refused to entertain jurisdiction in cases involving the Isle of Man on the ground it was on " old realm. " In *Penn* v. *Lord Baltimoore,* (1750) 1 Ves. 444, boundary disputes between two colonists of North America were held not justifiable in a Court of Law but proper matter for Parliamentary action. And in *Nabob of the Carnatic* v. *East India Company,* (1791) 1 Ves. Jr. 370, (1793) 2 Ves. Jr. 56, it was held that the Company acted as delegates of the Sovereign power of England in making contracts with potentates, and that therefore the matter could not be decided in a Court of Law. This case was cited with approval in *Buron* v. *Denman,* (1848) 2 Ex. 167, where a naval officer's acts in storming the gallinas to release two English citizens confined as slaves having been ratified by the Secretary of State for Foreign Affairs, it was decided that the acts of trespass were not within the purview of Courts. In *West Rand Central Gold Mining Company, Ltd.* v. *The King* (1905) 2
Cntral Gold Mining Company, Ltd. v. *The King* (1905) 2
K. B. 391, the proposition was affirmed " that, according to the well-understood rules of international law, a change of Sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation. " The case of *Rustomjee* v. *The Queen* was also cited, where the British Government had collected certain

claims from the Chinese Government on behalf of certain individuals ; it was there held that the Court could not enforce the claim of the individuals to that money in the hands of the Crown.

The writer proceeds to discuss the application of this doctrine in American Law. " The exact limits of judicial action in cases of this type have nowhere been laid down ; nor is it possible to do so. The notion that seems to be behind such cases is the fear of the consequences that might ensue were Courts to intefere in these matters. "

After pointing out that (in America) the Courts have invariably refused to take jurisdiction to interfere in that great group of matters involving foreign relations of the United States with other nations, and in matters relating to the discretion of executive and administrative officials, the writer deprecates the readiness evinced by some of the Courts to pass upon the policy of certain legislative measures. He thinks that it would have been better if they had been dealt with as political questions, instead of being tested by the Court's own view of the " due process " clause.

Signature as Agent excluding Personal Liability .—A note appearing in the Law Quarterly Review for January, 1924 comments on the recent case, *Universal Steam Navigation Co.* v. *James Mc Kelvie and Co.,* (1923) A. C. 492 and sets out succintly the law on the subject as it stands now. The joint effect of the above decision and of *Gadd* v. *Houghton,* (1876) 1 Ex. D. 357 which expressly approved therein, is said to be this : " Where it appears from the terms of the instrument itself, or by the addition of words to the signature of an executing party, that he does not intend to bind himself personally but as agent only, the other contracting party must look to the principal for the performance of the contract to the exclusion of liability on the part of the signatory ". " But there are other considerations which will have to be borne in mind, " continues the writer. " The best statement of an important one of general application is obtained in the Judgment of Crompton, J. in *Deslandes* v. *Gregory,* (1860) 2 Ell. & E. at page 609 : ' persons who put their names to a document thereby make themselves personally liable, unless they state upon the face of it that they sign it for another. And I agree that, if it is left ambiguous on the face of the instrument whether

they have so signed it, the construction most against the persons signing should prevail ; a principle which has been adopted in several recent cases. ' There is another judicial pronouncement which has been overlooked in many of the cases in which the addition of the words ' as agent ' or the like have been held not to qualify the liability of an executing party—namely, that effect should be given to every word used and that none should be rejected unless it is apparent that they have been introduced *per incuriam.* This was excellently summed up by Crowder, J in *Hudson* v. *Clementson,* (1856) 18 C. B. 213: ' the expression cannot have been introduced, as the plaintiff's counsel contend, for no purpose. '

BOOK REVIEWS.

TRIAL OF FREDERICK BYWATERS AND EDITH THOMPSON, edited by *Filson Young. Notable British Trials* published by *Butterworth and Co.*

The study of notable trials is not without its uses to the lawyer and the layman. The psychology of the actors in the sensational trials is bound to be of great interest to the reader; and in this respect the trial of Bywaters and Edith Thompson has its appropriate place among the notable trials. The future generations will not feel the extraordinary interest which the public took in the trial of the two persons ; but their interest will rest on a more substantial basis and the Editor has placed the whole record before his readers to form their own judgment on the unfortunate and painful case.

THE CHARITABLE AND RELIGIOUS TRUSTS ACT OF 1920 by *Prahlad C. Diwanji.*

The Charitable and Religious Trusts Act is an enactment which though it does not go far enough is useful to the extent to which it goes ; and this publication which gives the Act with notes and the references to cases on allied topics is bound to be of use to the profession and the public.